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No. 82-1555

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

PENNSYLVANIA PUBLIC UTILITY COMMISSION; SHANAMAN, SUSAN M., individually and as Chairman of the Pennsylvania Public Utility Commission; CAWLEY, JAMES H., JOHNSON, MICHAEL, TALIAFERRO, LINDA C., individually and as members of the Pennsylvania Public Utility Commission; ALFORD, JOHN G., individually and as Director of Safety and Compliance of the Pennsylvania Public Utility Commission, and WILSON, JOHN B., individually and as Director of Operations of the Pennsylvania Public Utility Commission,

Appellants

v.

CONSOLIDATED RAIL CORPORATION,

Appellee

On Appeal From the United States Court of Appeals for the Third Circuit

APPELLEE'S MOTION TO AFFIRM

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MOTION TO AFFIRM

Appellee Consolidated Rail Corporation (Conrail), moves that the final judgment and decree of the Court of

Appeals be affirmed, pursuant to Rule 16 of the Rules of the Supreme Court of the United States on the ground that it is manifest that the questions on which the decisions of the cause depend are so unsubstantial as not to warrant further argument.

The reasons in support of this position are stated in the argument in support of this motion, which follows.

STATEMENT

This is an appeal from the final judgment entered by the Court of Appeals for the Third Circuit on November 16, 1982, affirming the judgment of the District Court for the Eastern District of Pennsylvania, 537 F.Supp. 653 (1982). The Court of Appeals judgment is reported without opinion at 696 F.2d 981 (1982). The District Court held that a Pennsylvania statute requiring the installation and use of speedometers and speed recorders on certain locomotives was preempted by the Boiler Inspection Act, 45 U.S.C. §23 , by the Federal Railroad Safety Act, 45 U.S.C. §434, (FRSA) and by regulations issued by the Federal Railroad Administration thereunder, and in light of the Supremacy Clause of the United States Constitution, Article VI, Clause 2.

In 1972, the Pennsylvania Legislature enacted a requirement that locomotives be equipped either with speedometers or speed recorders. Speedometers display current speed to the engineer. Speed recorders are devices which make a taped record of locomotive speed for reference, which can only be observed after the run has ceased. Two years were allowed for compliance with the 1972 law. Pennsylvania Act No. 174 (1972). In 1974, the Federal Railroad Administration (FRA) published an Advanced Notice of Proposed Rulemaking, 39 Fed. Reg. 4929, acting under authority of the Boiler Inspection Act and the FRSA, calling for comments on whether both speedometers and speed recorders should be required on locomotives.

After the FRA's publication of its Advance Notice of Proposed Rulemaking, the Pennsylvania Legislature, in 1975, enacted a law requiring that speed recorders be used on locomotives. Act No. 49 (1975). This new law was codified into the Pennsylvania Consolidated Statutes, 66 Pa.C.S. §2705 (Jurisdictional Statement, Appendix A).

Thereafter, on May 21, 1979, FRA published its Notice of Proposed Rulemaking. FRA then stated that it would require speedometers, but ruled that recorders were not necessary for safety and would be uneconomical, if required. 44 Fed. Reg. 29610-11. Accordingly, the final regulations issued by FRA effective March 30, 1980, 49 C.F.R. §229.117, required only speedometers, but not speed recorders.

Conrail's locomotives, of which it owns some 4,500, are operated mainly in freight service and move in interstate commerce throughout the northeast United States on a pooled basis. In addition, Conrail on occasion operates in Pennsylvania locomotives owned by other carriers in connection with "run-through" operations or other use of such locomotives. The majority of Conrail's locomotives do not have speed recorders, and the cost to Conrail of installation and maintenance of the device was estimated at over $3,000,000.

Conrail brought this action seeking a declaratory judgment and injunction against the enforcement of the Pennsylvania speedometer and speed recorder law. The District Court issued a declaratory judgment which was affirmed by the Court of Appeals.

ARGUMENT

Conrail submits that this appeal is wholly appropriate for disposition by the Court in a summary manner and without argument by affirming the judgments of the lower courts. The "substantial" questions which Appellants seek to present to the Court are indeed unsubstantial. The legal bases which the courts below sustained Conrail's Motion for Summary Judgment and ruled that the Pennsylvania speed recorder statute was preempted by both the Boiler Inspection Act and the Federal Railroad Safety Act (FRSA) are based on clear legal principles which do not require further argument or discussion by this Court.

Conrail will discuss the two questions[1] raised by Appellants and demonstrate that they lack substance to an extent which justifies summary affirmance of the decisions below.

I.

The first question stated by Appellants is as follows:

I. Does the Boiler Inspection Act preempt the States from enforcing legislation requiring devices which are purely experimental in nature?

The phrasing of this question is an effort to avoid the well-established principles set forth in *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926).

It is significant that the *Napier* case dealt with a factual situation analagous to the present one. In *Napier*, certain state requirements called for fire doors on locomotives on interstate trains and cab curtains on locomotives during the winter months. The Interstate Commerce Commission, which then had power to regu-

1. "Only the questions set forth in the jurisdictional statement or fairly included therein will be considered by the Court." Sup.Ct.R. 15.1(a).

late locomotives under the Boiler Inspection Act,[2] had never required a particular kind of fire door or cab curtain. Here the Pennsylvania statute purports to require a device which the FRA, in promulgating its regulations, affirmatively rejected, thus going further than the ICC had in *Napier*. The Court in *Napier* pointed out that the statute precluded any state regulation of equipment on locomotives, since it had occupied the entire field. Justice Brandeis, speaking for the Court, at 272 U.S. 612-613, stated:

> The federal and the state statutes are directed to the same subject — the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the Commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the Commission has power to prescribed an automatic firebox door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion.
>
> Because the standard set by the Commission must prevail, requirements by the States are precluded, however, commendable or however different their purpose.

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2. Regulatory authority has been transferred to the Secretary of Transportation. 45 U.S.C. §28; 49 U.S.C. §1655(e)(1)(E).

The reliance by the courts below on this complete preemption doctrine was justified. Subsequent decision of this Court have repeatedly recognized the continuing validity of *Napier* as expressing the governing principle. Most recently in *Maryland v. Louisiana*, 451 U.S. 725 (1981), beginning at page 746, this Court restated the principles underlying the *Napier* case and included citation of that case as an example of an act of Congress which regulates a field in which the federal interest is so dominant as to preclude enforcement of state laws on the same subject:

> The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. It is basic to this constitutional command that all conflicting state provisions be without effect. See *McCulloch v. Maryland*, 4 Wheat, 316, 427 (1819). See *Hines v. Davidowitz*, 312 U.S. 52 (1941). Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). But as the Court stated in *Rice:*
>
> > "Such a purpose [to displace state law] may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co. v. Public Service Comm'n.*, 250 U.S. 566, 569; *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of

> state laws on the same subject. *Hines v. Davidowitz*, 312 U.S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern R. Co. v. Railroad Commission*, 236 U.S. 439; *Charleston & W. C. R. Co. v. Varnville Co.*, 237 U.S. 597; *New York Central R. Co. v. Winfield*, 244 U.S. 147; *Napier v. Atlantic Coast Line R. Co.*, [272 U.S. 605]. Or the state policy may produce a result inconsistent with the objective of the federal statute. *Hill v. Florida*, 325 U.S. 538. *Ibid.*

Likewise, in *California v. Taylor*, 353 U.S. 553 (1957), the Court emphasized the preemptive nature of the Railway Labor Act with respect to labor relations in the railroad industry, as opposed to state laws governing labor relations. Further, in footnote 8 on page 560 of the opinion, the Court referred to:

> . . . cases upholding the supremacy of federal statutes relating to railroads in interstate commerce, see *Napier v. Atlantic C. L. R. Co.*, 272 U.S. 605 (Boiler Inspection Act); *Southern R. Co. v. Railroad Commission of Indiana*, 236 U.S. 439 (Safety Appliance Act); *Erie R. Co. v. New York*, 233 U.S. 671 (Hours of Service Act); *Second Employers' Liability Cases*, 223 U.S. 1 (Employers' Liability Act).

In the face of these repeated holdings by this Court, it is apparent that *Napier* is controlling and that the total preemption of locomotive equipment expressed in the Boiler Inspection Act does not require further argument or discussion by this Court.

Appellants seek to avoid the impact of *Napier* by arguing that the speed recorders involved in this case are "purely experimental in nature." It is sufficient to note that this contention completely lacks merit. There is nothing in the record of the case, nor in the Pennsylva-

nia statute requiring speed recorders, which in any way indicates that the requirement is experiemental in nature. Indeed, the contention that there was an experimental aspect was first raised at the appellate level by the Public Utility Commission and was never presented as a consideration during the District Court's handling of the matter. The entire text of 66 Pa.C.S. §2705 is set forth at pages 1a-1b of Appendix A to the Jurisdictional Statement. Examination of that statute will show that there is nothing to indicate that the requirement for speed recorders is experimental. On the contrary, the State apparently had considered the matter and already decided that speed recorders would not be needed in yard switching or commuter passenger service. The statute requires notification by the railroads of compliance with the law, and requires record-keeping. It calls on the Public Utility Commission to enforce the provisions of the statute. Nowhere is there any reference to evaluation of the functioning or use of these devices, nor of any "experimental" basis for the statute. Thus, the attempt by Appellants to distinguish the present case on the stated ground from the general line of preemption cases exemplified in *Napier* and its progeny is wholly unsubstantial.

In fact, the only reference to the purpose or use of speed recorders in the record below is found in the discussion by the FRA in its Notice of Proposed Rulemaking issued in the Federal Register, 44 Fed. Reg. No. 99, p.29610-11, May 21, 1979. In that discussion, FRA in no way indicated any experimental nature of speed recorders:

> . . . At the time of the 1972 survey conducted by the Association of American Railroads in cooperation with the FRA and the Transportation Systems Center, roughly half of the fleet of line locomotives was equipped with speed recorders that were being used on a regular or "casual" basis. Another one-quarter of line locomotives were equipped with devices that were not being utilized. More than 5,000 units

equipped with speed indicators did not have recording capability. FRA inspections of equipped locomotive units have corroborated the view of commenters responding to the advance notice that many recording devices are not in operable condition.

The FRA does not believe that the "state of the art" for locomotive speed recorders has yet progressed to a point at which it is practical to mandate their universal application. More significantly, FRA does not believe that the safety benefits of speed recorders are sufficiently immediate and direct to warrant the expenditures which would be required to equip remaining non-equipped locomotives, repair inoperative units, and conduct periodic maintenance. A conservative estimate of initial costs to complete installation of recorders on the existing road locomotive fleet, including replacement of some existing units, is $7,000,000. Annual maintenance costs and costs associated with the interpretation and storage of data would also be substantial.

Some of the safety benefits which flow from the use of speed recorders can be achieved by other, less costly means. For instance, computations of time between two points can often disclose speed violations. Rotation of motive power on assignments can facilitate the selective use of speed or data recorders to evaluate crew performance. Finally, although speed recorders are helpful in accident investigations, they seldom provide the sole indicium of speed available to the investigator.

Therefore, FRA proposes to terminate the proposals contained in Docket No. LI-4 relating to speed recorders.

Nothing in this discussion indicates that speed recorders were an experimental device. On the contrary, they have been used by many railroads. However, FRA simply de-

cided that they were not required for safety of railroad operations and should not be required on locomotives.

The case of *Southern Ry. Co. v. Lunsford*, 297 U.S. 398 (1936), referred to by Appellants, does not help their position. That was a personal injury case where a contributing factor to the accident allegedly was the failure of a "watchman" device which had been placed on steam locomotives on an experimental basis. The device was supposed to apply the brakes in the event of an accidental derailment of the locomotive trucks. The Court held there that the liability in the case could not be absolute on the railroad, since the experimental device was not a "part or appurtenance" of the locomotive under the Boiler Inspection Act, and therefore the case did not fall within the general rule that violations of the Boiler Inspection Act in connection with personal injuries give rise to absolute liability on the railraod. *Lilly v. Grand Trunk R.R.*, 317 U.S. 41 (1943). Obviously, *Lunsford* did not involve any question of federal preemption and has no bearing on the continuing authority of the *Napier* case. Appellants may not properly avoid the preemptive principles of both the Boiler Inspection Act and the FRSA by a belated effort to classify the state's requirements as "experimental."

Appellants have not presented a question under their point I which calls for further consideration by this Court. Their contentions are unsubstantial and contrary to settled law.

II.

The second question submitted as a "substantial" issue is stated as follows by Appellants:

II. Has the FRA issued a rule, regulation, order or standard covering the same subject matter as 66 Pa.C.S., §2705?

In this question, Appellants question the finding of the District Court, affirmed by the Court of Appeals, that the federal regulations constituted a "rule, regulation,

order or standard covering the subject matter of such State requirement." Federal Railroad Safety Act, §205, 45 U.S.C. 434. Appellants seek to read this portion of the statute as a restriction against state regulation only if the FRA has acted "relative to the precise subject matter" covered by state regulation, and argue that, since the FRA omitted speed recorders from its regulation, it had not regulated that subject matter.

The argument ignores the fact that the FRA specifically considered and rejected the concept that speed recorders were required on locomotives. It did consider and adopt regulations relating to speedometers (visual indicators of speed). As the Court stated in *Napier*, "the fact that the Commission [FRA] has not seen fit to exercise its authority to the full extent conferred has no bearing upon the construction of the Act delegating the power." 272 U.S. 613.

Conrail submits that the action of the FRA in this case obviously dealt with the subject matter of speedometers and speed recording devices on locomotives and that the regulations promulgated by FRA after full consideration at 49 C.F.R., Part 229, §229,117, did constitute regulation of the same subject matter as the State statutory requirements.

In addition, Appellants' argument in its Jurisdictional Statement fails to meet the full scope of the preemptive intention expressed in §205 of the FRSA. When §205 is read as a whole, it overwhelmingly contemplates preemption of the Pennsylvania statute. For convenience, the section reads:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State

> may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce. Pub.L. 91-458, Title II, §205, Oct. 16, 1970, 84 Stat. 972.
> 45 U.S.C. §434

While Appellants concentrate only on the issue of whether the "subject matter" of the state requirement has been covered, it is apparent that the courts below considered the application of the FRSA as a whole and set aside the State statute, not only on the basis that the Secretary had adopted a rule covering the subject matter, but also on the other statutory bases. Four other aspects of §205 bear on the decisions below and further develop the preemptive character of the federal Act.

First, the primary policy of the FRSA, as set forth in the first sentence of §205, is that regulations "relating to railroad safety shall be nationally uniform to the extent practical." This general principle is clear and entitled to great weight. Uniformity of locomotive equipment is practical, and indeed necessary, as locomotives are used freely in interstate traffic and run from state to state. The District Court cited with approval comments by J. Friendly that prescription of different safety devices by each state would have a "paralyzing effect." *Opinion*, footnote 14, Jurisdictional Statement, App. B, page 10a.

Second, the FRSA says that a state may only adopt or continue in force additional regulations "when necessary to eliminate or reduce an essentially local safety hazard." There is no reasonable basis to challenge the holding of the lower courts that the Pennsylvania statute did not deal with an essentially local safety hazard. As the court indicated, there is nothing "local" in the words of the statute. *Opinion*, Jurisdictional Statement, App. B,

p. 13a. Nor can there be anything local in the operation of a locomotive over railroad lines which run into adjacent states and beyond and over the Northeast Corridor railroad system. The courts below correctly held that the statewide requirement of speed recorders was obviously not addressed to a "local" hazard.

Third, the FRSA provides that State regulations must not be "incompatible" with any federal law or regulation. The Court met this test by holding that the Pennsylvania speed recorder requirement was obviously incompatible with a federal regulation which specifically had decided that those items are not necessary on locomotives.

Finally, the state regulations must not be a burden on interstate commerce. Appellants made no effort to meet this test, nor did the courts below reach the point.

Consequently, the limited issue raised by Appellants as to whether the reference to "subject matter" in the Federal Railroad Safety Act was intended to apply to each individual item of equipment which might be placed in a locomotive, as opposed to a more general regulation of equipment and appurtenances on locomotives, does not present an issue which needs detailed consideration by this Court. Appellants limit their question to one phrase in the FRSA. The courts below considered Section 205 as a whole and clearly reached a correct result. In any event, their construction of the phrase "subject matter" does not call for further consideration.

CONCLUSION

Conrail submits that Appellants have failed to present questions of such substance as to call for further briefing and argument. The opinion of the District Court is comprehensive and correct. Appellants, in their questions presented, do not challenge the principal bases of the judgments below, but concentrate on an unsupported argument that the Pennsylvania statute was merely "experimental," and on a single narrow aspect of the Court's application of the FRSA, whereas the judgments were based on other aspects of §205 of FRSA which are not questioned by Appellants.

The judgments below conform to the preemption principles established by prior decisions of this Court. There is no conflict shown with the decisions of this Court, nor with the decisions of any other courts of appeal.

The issues are limited to a state statute which, so far as the record shows, exists in no other states. The matter, therefore, is not of general interest in the application of federal law.

Therefore, this Court should affirm the decisions of the courts below without further consideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served three copies of Appellee's "Motion to Affirm" on Appellants herein by First Class Mail, postage prepaid, on April 11, 1983, addressed to:

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Hermon M. Wells

APPENDIX A

Listing Pursuant to Supreme Court Rule 28.1

Consolidated Rail Corporation has no parent company. It has the following:

Majority-Owned Subsidiaries
Buffalo Creek Railroad Company
Calumet Western Railway Company
Canada Southern Railway Company
Conrail Equity Corporation
Detroit River Tunnel Company
Detroit Terminal Railroad Company
Indiana Harbor Belt Railroad Company
Merchants Despatch Transportation Corporation
Niagara River Bridge Company
Pennsylvania Car Leasing Company
Penn Central Communications Company
Pennsylvania Truck Lines, Inc.
St. Lawrence & Adirondack Railway Company

Affiliated Companies
Akron & Barberton Belt Railroad Company
Albany Port Railroad Corporation
Belt Railway Company of Chicago
Chicago and Western Indiana Railway Company
Fruit Growers Express Company
Illinois Terminal Railroad Company
Lake Erie and Eastern Railroad Company
Lakefront Dock & Railroad Terminal Company
Monogahela Railway Company
Nicholas, Fayette & Greenbrier Railroad Company
Peoria and Pekin Union Railway Co.
Pittsburgh, Chartiers & Youghiogheny Railway Company

Terminal Railroad Association of St. Louis
Toledo Terminal Railroad Company
Trailer Train Company
    Calpro Company
    Delpro Company
    Hamburg Industries, Inc.
    Railbox Company